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pro bono publico

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BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

November 23, 2009

Lisa Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Intent to Sue Administrator of the Environmental Protection Agency for Failure to Perform Its Non- discretionary Duty to Promulgate Numeric Nutrient Criteria for the State of Wisconsin.

Dear Ms. Jackson:

This letter is to provide notice, pursuant to the citizen suit provision of the Federal Clean Water Act, 33 U.S.C. § 1365 (“CWA” or “the Act”), that Clean Water Action Council of Northeastern Wisconsin, Gulf Restoration Network, Milwaukee Riverkeeper, Prairie Rivers Network, River Alliance of Wisconsin, Sierra Club, and Wisconsin Wildlife Federation intend to file suit in the Federal District Court for the Western District of Wisconsin against the Administrator of the United States Environmental Protection Agency (“EPA”) for failing to perform its non-discretionary duty under the Act to promulgate numeric nitrogen and phosphorus criteria for the state of Wisconsin.

The citizen suit provision of the CWA provides an opportunity for any citizen to commence a civil action in federal court on his or her own behalf against the EPA Administrator for an alleged failure of the Administrator to perform any non-discretionary duty imposed by the CWA on the Administrator. 33 U.S.C. § 1365(a)(2).

The CWA requires the EPA Administrator to “promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.” 33 U.S.C. § 1313(c)(4)(B).

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Scientists have known for decades that many marine and fresh water bodies of the United States are being harmed by nitrogen and phosphorus pollution. This pollution causes or contributes to low dissolved oxygen levels and has numerous adverse effects on aquatic life and on the economic, aesthetic, and recreational value of our rivers, lakes, and streams, including contamination of drinking water supplies and the growth of potentially toxic cyanobacteria or “blue-green algae,” in lakes and rivers.¹

Every summer, Wisconsin communities and tourism-related businesses cope with the detrimental effects of nutrient pollution, ranging from foul, smelly water to health threats, such as toxic algae and contaminated drinking water, and from nuisance algae blooms to fish kills and beach closures. Due to increasing nutrient concentrations in Wisconsin’s waters, the frequency and duration of toxic algal blooms has severely increased over the past decade. Nitrogen and Phosphorus pollution are listed as the pollutants causing approximately 36% of the 453 Category 5A impairments listed in Wisconsin’s 2008 303(d) impaired waters list. By mid-summer 10 beaches in Madison, Wisconsin had been closed for a “combined total of 90 days, mostly because of algae blooms.”² Amongst various reports of harm caused by excess nutrients in Wisconsin waters this season, at least 3 dogs have reportedly died due to nutrient induced toxic blue-green algae and the Wisconsin Department of Health Services has received 41 complaints related to health concerns with blue-green algae, including rashes, sore throats and eye irritation.³

Nitrogen and phosphorus pollution in Wisconsin contributes to downstream water quality impairments including a huge dead zone in the Gulf of Mexico that threatens numerous human and ecological communities as well as the basic health of the Gulf.⁴ Nitrogen and phosphorus pollution in Wisconsin also negatively impacts downstream waters that flow out of Wisconsin, such as the Rock River and Fox River. Furthermore, Lake Michigan is also negatively impacted by phosphorous pollution.

On February 1, 2008, almost ten years after EPA told states to develop numeric nutrient water quality standards, the Wisconsin Department of Natural Resources (“DNR”) convened a group of interested stakeholders and held its *first* Phosphorus Criteria Advisory Committee meeting. To guide the development of phosphorus criteria for streams in Wisconsin, DNR relied on U.S. Geological Survey (“USGS”) data and

¹ State-EPA Nutrient Innovations Task Group, *An Urgent Call to Action*, 2-11 (Aug. 2009).

² Janie Boschma, *Algae, Bacteria Keep Madison Beaches Closed More Than Usual*, Wis. St. J., July 25, 2009, available at http://host.madison.com/news/article_42590528-a2ec-5953-a3fl-c85e7cc78a17.html?mode=story.

³ *Stinky Blue-Green Algae Blamed for Dog Deaths*, Sept. 27, 2009, available at http://www.msnbc.msn.com/id/33045773/ns/us_news-environment/ (reporting from Wausau, Wisconsin).

⁴ U.S. Geological Survey, *Share of the Nutrient Flux (mass per time) Delivered to the Gulf of Mexico from States in the Mississippi and Atchafalaya River Basins*, http://water.usgs.gov/nawqa/sparrow/gulf_findings/ES&T_states.pdf; R.B. Alexander, et al., *Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mexico from the Mississippi Basin* 42 *Envtl. Sci. & Tech.* (2008), available at http://water.usgs.gov/nawqa/sparrow/gulf_findings/.

reports regarding water quality impacts of nitrogen and phosphorus on the biotic integrity of Wisconsin streams and rivers.⁵ Yet DNR has yet to propose that its governing board, the Natural Resources Board, amend the Wisconsin Administrative Code to include numeric criteria for phosphorus. Despite the USGS data related to nitrogen impacts on the biological integrity of Wisconsin streams and rivers, DNR does not expect to begin promulgation of numeric nitrogen water quality criteria until at least 2012.⁶ In the meantime DNR refuses to derive water quality based effluent limits in NPDES permits to implement its narrative standard as applied to nitrogen and phosphorus.⁷

More than a decade has passed since EPA, acknowledging the severity of nitrogen and phosphorus pollution, directed states to develop numeric criteria for nitrogen and phosphorus. In 1998 EPA determined that prompt development of numeric standards for the nutrients phosphorus and nitrogen in all states, including Wisconsin, was necessary to meet the requirements of the Clean Water Act. The Clean Water Action Plan ("CWAP") issued on February 19, 1998 explained:

Excessive nutrient loadings. . . result in excessive growth of macrophytes or phytoplankton and potentially harmful algal blooms (HAB), leading to oxygen declines, imbalance of aquatic species, public health risks, and a general decline of the aquatic resource. Nutrient over-enrichment has also been strongly linked to the large hypoxic zone in the Gulf of Mexico and to recent outbreaks of *Pfiesterias* along the mid-Atlantic Coast.

State water quality reports indicate that over-enrichment of waters by nutrients (nitrogen and phosphorus) is the biggest overall source of impairment of the nation's rivers and streams, lakes and reservoirs, and estuaries. In the 1996 National Water Quality Inventory, states reported that 40 percent of surveyed rivers, 51 percent of surveyed lakes and 57 percent of surveyed estuaries were impaired by nutrient enrichment.

...

EPA will develop nutrient criteria – numerical ranges for acceptable levels of nutrients (i.e., nitrogen and phosphorus) in water....EPA will develop nutrient criteria for the various water

⁵ Dale M. Robertson, et al., U.S.G.S., *Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin* (2006) available at http://pubs.usgs.gov/pp/pp1722/pdf/PP_1722.pdf; Dale M. Robertson, et al., U.S. Geological Survey, *Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin* (2006) available at <http://pubs.usgs.gov/pp/1754/pdf/pp1754.pdf>.

⁶ Wisconsin Dep't of Natural Res., *2008-2011 Triennial Standards Review Cycle: Topic Descriptions* 5, 8 (July 2, 2008) available at http://www.dnr.state.wi.us/org/water/wm/wqs/tsr/documents/Topic_Descriptions.pdf.

⁷ Memorandum from Russ Rasmussen, Watershed Management, on Determining Reasonable Potential for Narrative Standards to the WPDES Permits Staff 2-3 (Dec. 14, 2006).

body types and ecoregions of the country by the year 2000. ... Within three years of the EPA issuance of applicable criteria, all states and tribes should have adopted water quality standards for nutrients. Where a state or tribe fails to adopt a water quality standard for nutrients within that three-year period, EPA will begin to promulgate water quality standards for nutrients...⁸

On June 25, 1998 EPA published its *National Strategy for the Development of Regional Nutrient Criteria* in the Federal Register, acknowledging that nutrient pollution had recently been reported to be the leading cause of impairment in lakes and coastal waters and the second leading cause of impairment in rivers and streams.⁹ This plan reiterated that all states were required to develop numeric nitrogen standards that supported designated uses by 2003, or EPA would develop standards for them.¹⁰

EPA did establish recommended numeric nutrient criteria for ecoregions by early 2001.¹¹ Yet in 2007 EPA's Office of Water issued a report outlining the detrimental affects of nitrogen and phosphorus pollution and the states' general failure to adopt numeric nitrogen and phosphorus criteria.¹² EPA acknowledged that "[v]irtually every State and Territory is impacted by nutrient-related degradation of our waterways" and explained that the adoption of numeric nutrient water quality criteria would allow for:

- easier and faster development of TMDLs;
- quantitative targets to support trading programs;
- easier issuance of protective NPDES permits;
- increased effectiveness in evaluating success of nutrient runoff management programs; and
- measurable, objective water quality baselines against which to measure environmental progress.¹³

EPA stated very clearly that "we cannot afford delayed or ineffective responses to this major source of environmental degradation."¹⁴

In August 2009 EPA's Office of the Inspector General ("OIG") painted a grim picture of the states' stagnant progress in adopting numeric nutrient criteria in a report titled "EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality

⁸ U.S. EPA, *Clean Water Action Plan: Restoring and Protecting America's Waters* 58-59 (Feb. 2008) [hereinafter CWAP].

⁹ U.S. EPA, *National Strategy for the Development of Regional Nutrient Criteria*, iii (June 25, 1998).

¹⁰ *Id.* at 5-6.

¹¹ Nutrient Criteria Development; Notice of Ecoregional Nutrient Criteria, 66 Fed. Reg. 1671 (Jan. 9, 2001).

¹² Memorandum from Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, on Nutrient Pollution and Numeric Water Quality Standards, (May 25, 2007), *available at* <http://www.epa.gov/waterscience/criteria/nutrient/files/policy20070525.pdf>

¹³ *Id.*

¹⁴ *Id.*

Standards.”¹⁵ Recognizing that “[s]tates have not been motivated to create these standards because implementing them is costly and often unpopular with various constituencies,” the report found that under the current approach there are no assurances that States will develop protective standards.¹⁶ OIG recalled that “[h]istorically, EPA has said it would use its authority to set standards as a motivator and then failed to set standards,” and reiterated that states upstream of the Gulf of Mexico and the Mississippi River have failed to set nutrient standards for themselves; “consequently, it is EPA’s responsibility to act.”¹⁷ In response to the OIG’s report, EPA explained its view that “numeric nutrient State water quality standards are needed to protect not only those waters already impaired by nutrient pollution, but also to prevent high quality waters from future impairment.”¹⁸

The State-EPA Nutrient Innovations Task Group reiterated the urgency of adopting numeric nitrogen and phosphorus criteria in its August 2009 report *An Urgent Call to Action*. That report, the collaboration of state and EPA water quality and drinking water directors and program managers, recognizes the inadequacy of state and national efforts to control nutrient pollution, and calls for national leadership.¹⁹ Not surprisingly, the Task Group rated “Federally required state WQS numeric nutrient water quality criteria” as one of the top five most effective tools for reducing nitrogen and phosphorus pollution.²⁰

Having determined that numeric standards were necessary to meet the requirements of the Act in the Clean Water Action Plan and having reconfirmed this determination in the above referenced documents and in other findings, the Administrator has failed to perform its non-discretionary duty under section 303(c)(4)(B) of the CWA to promptly set numeric nitrogen and phosphorus criteria for the state of Wisconsin.

V. PARTIES GIVING NOTICE

The parties giving notice are:

Clean Water Action Council of Northeastern Wisconsin
2484 Manitowoc Rd.
Green Bay, WI 54311
(920) 468-4243

¹⁵ U.S. EPA, Office of the Inspector Gen., *EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality Standards*, No. 09-P-0223 (Aug. 26, 2009).

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 11.

¹⁸ *Id.* at app. C (Memorandum from Michael H. Shapiro, Acting Assistant Administrator, U.S. EPA on Agency Response to the Draft Evaluation Report to Dan Engelberg, Director, Water Enforcement Issues (July 15, 2009)).

¹⁹ See *supra* note 1, at 33.

²⁰ See *supra* note 1, at 20-21, tbl. 2.

Gulf Restoration Network
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New Orleans, LA 70112
(504) 525-1528

Milwaukee Riverkeeper
Milwaukee Environmental Consortium
1845 N. Farwell Avenue, Suite 100
Milwaukee, WI 53202
(414) 287-0207

Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, Illinois 61820
(217) 344-2371

River Alliance of Wisconsin
306 East Wilson Street, Suite #2W
Madison, WI 53703
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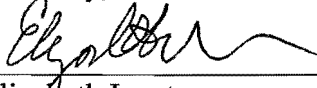
Sierra Club – John Muir Chapter
222 South Hamilton Street, Suite #1
Madison, WI 53703
(608) 256-0565

Wisconsin Wildlife Federation
W7303 County Highway CS
Poynette, WI 53955
(608) 635-2742

VI. CONCLUSION

The individuals giving notice encourage you to contact them through their attorneys as soon as possible should you desire to discuss the allegations set forth in this letter; if this matter is not resolved to the satisfaction of the individuals giving notice, they will file suit on the sixtieth day following the date of this letter.

Sincerely,



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Madison, WI 53703
608-251-5047

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Environmental Law & Policy Center
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Counsel for: Clean Water Action Council of
Northeastern Wisconsin, Gulf Restoration Network,
Milwaukee Riverkeeper, Prairie Rivers Network,
River Alliance of Wisconsin, Sierra Club, and
Wisconsin Wildlife Federation

Copies To:

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Chicago, IL 60604

Mr. Matthew Frank, Secretary
Wisconsin Department of Natural Resources
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P.O. Box 7921
Madison, WI 53707-7921

Mr. Todd Ambs
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